

National Pollutant Discharge Elimination System (NPDES) State Legal Authority Review Checklist

11/09/06 Draft - Missouri

I. PRE-REVIEW INFORMATION/ FILE INVENTORY

A. *Program Authorization History:*

1. Base NPDES Program:

Date Authorized: ___ October 30, 1974

State Agency Authorized to Administer Program: ___ Missouri Department of Natural Resources

2. Does the program authorization record include a copy of the approval of the State's Continuing Planning Process (CPP) at the time of original program authorization? _____ Yes
_____X___ No

3. In addition to the Base NPDES Program, what other parts or revisions to the NPDES program has the State adopted regulations to implement and for which it obtained approval from EPA?

Additional Program Modification/ Regulatory Revisions	Date authorized	State Agency Authorized to Administer Program	Relevant State law(s) & regulation(s) (include general provisions only , e.g., 40 CFR Part 403 for pretreatment program; detailed citations are needed in the rest of the checklist)
Pretreatment	6/3/81	Missouri Department of Natural Resources	644.026; 644.041 10 CSR 20-6.100
General permits	12/12/85	Missouri Department of Natural Resources	644.016 (8); 644.026. 1(14); 644.051. (4);(10); 644.052(6) 10 CSR 20-6.010 (13) 10 CSR 20-6.011 (3) 10 CSR 20-6.200 (6)
Federal Facilities	6/26/79	Missouri Department of Natural Resources	644.016(14) (Definition of person)
Biosolids (sludge)*	No	N/A	N/A
Storm water (MS4, construction, industrial)?			
CAFOs			

Great Lakes Guidance (Great Lakes States only)	N/A	N/A	N/A
316(b)			
Other (describe)			

Comments: Please note here whether any of the above were partial program modifications, with additional elements expected to phase-in over time and when those elements are expected to phase-in.

Re: General Permits: A note indicates that no MOA revision was required at the time, stating that general permit language could be included at a later time. Was it ever included in a subsequent MOA?

**Note to Reviewers: State NPDES programs are not required to obtain authorization of a biosolids program, although some have opted for this authorization (OK, TX, UT, SD, WI). Regulations relevant to biosolids permitting are scattered throughout the NPDES regulations. If a State does not have an approved biosolids program, omission of provisions related to biosolids is not a deficiency.*

B. Post-Approval Legal Authority Review History

Program Element	Date of review	Reviewing Party	Note: Any findings that are still relevant (i.e., not resolved) should be incorporated into the checklist; Here describe the outcome of the review, e.g., sent to Region, sent to State, legal authority changes by the State approved by EPA, etc.
Please note scope of program reviewed, e.g., general revisions to NPDES regulations, Storm water, CAFOs, etc.			

Base NPDES Program	1985	ORC	<p>ORC conducted a review "with guidance from" OW. This review was sent to the state on 11/29/85 by the Office of Water. A major deficiency identified at that time was the lack of pretreatment regulations. That defect has since been remedied. However, many other potential issues identified in this review have not been addressed by the State. For the majority of those issues that remain to be addressed, an attempt has been made to integrate the concerns remaining from 1985 into this review. For any comprehensive review of Missouri's legal authority to operate its NPDES program, it is recommended that the text of the 1985 review be consulted in addition to this text.</p> <p>On May 14, 1986, the EPA issued comments on Missouri's legal authority to operate its NPDES program. These comments were produced by the program development branch of EPA. The file shows evidence that they were transmitted to the Water Programs Branch. However, there is no indication that they were forwarded to the State. It appears as if these comments are based upon the data from the 1985 review. As such, many of the comments included in this document also have not been addressed by Missouri.</p> <p>Following the EPA reviews, the file contains a review completed by Science Applications International Corporation. The review was transmitted to David Greenberg in the Permits Division of the Office of Water Enforcement and Permits on 2/20/87. According to a cover memo, the review is based on Hans Bjorson's June 1986 comments on an earlier SAIC draft review. There is no evidence in the file of any other draft reviews. Additionally, there is no evidence in the file to suggest that this review was transmitted to the State. It does not appear to be based upon the same data as the 1985 review. However, it reaches many of the same conclusions. As such, it should be included in any comprehensive review of Missouri's current authority to implement its NPDES program.</p> <p>Also included is a response by Missouri Assistant AG Lindholm dated 3/5/87. That response addresses the content of the 1985 review. It represents an evaluation of the 1985 review, serving as the basis for future discussions. It is not a formal AG Opinion interpreting the law of Missouri.</p> <p>What then follows is a letter from the Director of the Water Management Division to the Director of the Water Pollution Control Program of the Missouri Department of Natural Resources. The letter indicates that headquarters is conducting a review of Missouri's program. It then suggests that discussions on the overall program review be delayed pending the headquarters review. It appears as if the review process was then put on hold. There is no further evidence of any communication in the file regarding the review process. It appears as if this effort (starting during the Summer of 2003) is the first such effort to revive the Missouri review process which ceased in 1987.</p>
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C. *Transfer of Program Responsibilities to Another State Agency [For States to Fill Out]*

Has the State transferred any program responsibilities to a different agency than the one identified during the initial program authorization or subsequent program modifications? _____ Yes ☒ No

If yes, please describe _____

D. Legal Authority Revisions That Have Not Been Submitted to EPA [For States to Fill Out]

Please list all currently effective revisions to the regulations governing the State's NPDES program that have been adopted since initial program authorization but not submitted to EPA for review and approval.

Cite	Effective Date	Brief Description

E. Memorandum of Agreement (MOA) Information:1. *Original NPDES Program Authorization MOA:*

Date Signed: __ March 29, 1974

Date Effective: __ October 30, 1974

2. *Has the State ever needed to revise the original MOA?* [Note: Please include all MOAs or MOA addenda that affect NPDES program implementation, e.g., jurisdiction over discharges in Indian Country, ESA Consultation, NHPA Consultation, DOE, Other (CAFO, GLI, mining, storm water, etc.).]

MOA Revisions	Reason for Revision	Date Signed	Effective Date	Signatory Parties	Applicable Federal/State law and/or regulation
#1	Implement Federal Facilities program	2/5/79	5/22/79	EPA region 7 Fred Lafser, Director, Missouri DNR. Marvin Durning, Ass't Administrator for Enforcement	644.016(14) (Definition of person)
#2	Implement Pretreatment Program	5/6/80	6/3/81	Fred Lafser, Director Missouri DNR EPA Region 7 Ann Gorsuch Administrator, USEPA	644.026.; 644.041 10 CSR 20-6.100

Additional information included in the State checklist:***Does the MOA provide for requirements as outlined in:***

Federal Citation	Brief Description	Yes? ("✓" below)	No? Please explain below.
40 CFR Part 123.24	MOA with Regional Administrator	✓	
40 CFR Part 123.42	Receipt and Use of Federal Information	✓	
40 CFR Part 123.43	Transmission of Information to EPA		MOA has a sentence that reads, "Any request received from an applicant for confidential treatment of information contained in any NPDES form which the executive secretary considers valid must be forwarded to the regional administrator for concurrence." A previous review pointed out that this language might allow a liberal application of confidentiality protection. The MOA only establishes a procedure for forwarding comments on confidentiality issues. It does not establish the standards for finding something to be public or protected; those standards are presumably found within the substantive state regulations. 10 CSR 20-6.020(3)(A) provides that information other than effluent data, support documents or reports contained in any issued permit or document in the water pollution control program may be made confidential upon a showing. This language does not precisely track 40 CFR 122.7, which requires all of a permit application and the permit to be public information, and therefore may be inconsistent with the federal rule.

40 CFR Part 123.44 (a) & (b)	EPA review of and objections to State permits within 90 days		There is a provision for comments to be made by the regional administrator within 30 days, and a subsequent reference to the procedures listed in 40 CFR 124 Subp. D, E, F, and G. This should be updated to reflect the requirements in 40 CFR 123.44
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F. *Statement of the State Attorney General (AG):*

1. *Original NPDES Program Authorization State Attorney General Statement:*

Date Signed: _____

Date Effective: July 31, 1974

2. *Does the State AG Statement address any State activities on Indian lands [40 CFR §123.23(b)]?*

YES _____ NO X

If yes, please describe: _____

3. *Has your State ever needed to revise or supplement the original State AG Statement?*

State AG Statement Revisions	Reason for Revision or Supplemental Provisions	Date Signed	Effective Date	Applicable Federal/State law and/or regulation
#1	Adopting pretreatment regulations.	9/11/78	9/11/78	644.026; 644.041 10 CSR 20-6.100
#2	Citing authority for federal facilities	1/26/79	1/26/79	644.016(14): Definition of person.
#3	Citing authority to issue general permits.	3/4/82	3/4/82	644.016(8); 644.026.1(14); 644.051(4), (10); 644.052(6) 10 CSR 20-6.010(13) 10 CSR 20-6.011(3) 10 CSR 20-6.200(6)
#4	Letter from AG responding to questions raised by 1985 Review	3/5/87		

II. NPDES REGULATIONS: Required State Legal Authorities and Related Requirements

A. Introduction

States must have legal authority to implement the provisions described in Parts II and III of this checklist. See generally 123.25 and 403.10(f). States may omit or modify a provision if the effect is to impose a more stringent requirement. Where generally applicable, we have indicated, below or in Appendix 1, whether omission of a revised regulation would make the state program more stringent and therefore its absence would not be considered a deficiency in a state's required legal authorities.

You will need a copy of the regulations (40 CFR Parts 122-125) for this review. In many instances, referenced regulations are paraphrased or only briefly described in the checklist and you will need the full text of the regulation to evaluate the adequacy of a state provision(s).

Appendix 1 is a list of major revisions to the federal NPDES regulations since the 1987 amendments to the CWA that State programs must be able to implement (i.e., included in the list at 40 CFR 123.25 and elsewhere in Part 123). This Appendix lists regulations that are included in the checklist. We are providing this as a reference to readily identify when new requirements came into being.

B. Source and Date of Materials Reviewed (e.g., state website, hard copy obtained from Region or State) Please list documents and other materials used in this review.

Effective Date	Source
2/28/06	All State regulations were obtained from the website of the Missouri Secretary of State. The date each regulation was updated is noted in each chapter; for example, Chapter 1 was updated on 10/31/01. All citations are current as of 2/28/06. See http://www.sos.mo.gov/adrules/csr/current/10csr/10csr.asp#10-20 .
2/28/06	All State statutes were obtained from the website of the Missouri General Assembly. The Missouri Clean Water Law used was last updated on 8/28/05. See http://www.moga.state.mo.us/statutes/chapters/chap644.htm .
7/31/74	Base NPDES program attorney general statement obtained from EPA HQ files.
9/11/78	Pretreatment program attorney general statement obtained from EPA HQ files.
3/5/87	Attorney general statement responding to a 9/30/85 review of Missouri's NPDES regulations obtained from EPA HQ files.
3/29/74	Base NPDES program protocol working agreement obtained from EPA HQ files.
9/24/74	Memorandum of agreement transferring authority from Clean Water Commission to the Department of Natural Resources obtained from EPA HQ files.
6/3/81	Pretreatment program memorandum of agreement obtained from EPA HQ files.

C. Overarching Issues

1. *Incorporation by Reference:* Many States adopt federal regulations by reference. When this happens, please characterize the scope.

- a. Does it ☐ generally or ☐ specifically identify which federal regulations are being incorporated? There does not appear to be a general incorporation of federal regulations in the conventional sense since there is no sweeping express or explicit incorporation of federal authority. Nonetheless, there are numerous broad articulations of the need to comply with federal requirements. For example, 644.026.1(13) of RS Mo. requires the Commission to hold such hearings and take such testimony "as required by any federal water pollution control act." Similarly, 644.051.4 obligates the Director to determine if any proposed source will violate any federal effluent limitations or regulations or national performance standards and shall deny a permit if the source will violate the federal water pollution control act or any regulations, limitations or standards. Missouri regulations appear to follow the same approach. 20-6.010(8)(A)8. requires that permits incorporate federal toxic effluent standards when the federal standard is more stringent than the standard that would otherwise appear in the permit. 20-6.010(9)(A) prohibits issuance of a permit where its terms and conditions do not comply with the Federal Clean Water Act and federal regulations. There are other examples.
- b. Does the incorporation cover ☐ only the federal regulations in effect at the time of the incorporation or ☐ current and future changes to federal regulations? ☒ unknown
- c. Does the Attorney General's Statement address incorporation by reference issues, particularly prospective incorporation ☒ Yes ☐ No
- d. If addressed in the Attorney General's Statement, what are major conclusions?
Missouri Attorney General Webster, in a March 5, 1987, letter to the EPA Regional Assistant Counsel, responded to a question about potential problems in incorporation by reference practice caused by later changes in federal regulations. He suggested that the concern could be addressed by the state Clean Water Commission adopting a regulation that authorized it to reject future federal changes by express action within a specified time period after federal enactment, with the concomitant explicit result that federal changes become effective through state incorporation if not rejected by the Commission within the prescribed time. Unfortunately, it does not appear that the Commission enacted such a regulation, leaving the status of federal changes occurring after state regulatory enactments that incorporate federal requirements unclear.

2. *General Rules of Interpretation:* Does the State have general rules of interpretation such as:

- a. A prohibition against state provisions that are more stringent than federal requirements?
☐ Yes ☒ No
Cite: _____
- b. Provision stating that state regulations should be interpreted consistent with federal requirements?
☒ Yes ☐ No
Cite: Missouri's incorporation practices, described above, could as easily be seen as

requiring consistency with federal requirements. Examples of and citations to instances of this approach are presented in C.1.a.

- c. Other?
_____ Yes ___X___ No

If yes, please provide cite and language _____

D. Regulations Addressing Permit Development

1. 40 CFR §122.2 - Definitions

Note to reviewers: 122.2 contains numerous definitions (See attachment 2) . Please focus review on the ones listed below, which relate to the jurisdictional boundaries of the program. Please also identify state definitions that have no federal counterpart and are related to substantive requirements.